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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Allocation of)
Spectrum Below 5 GHz Transferred)
from Federal Government Use)

ET Docket No. 94-32

REPLY COMMENTS OF THE ASSOCIATION
FOR MAXIMUM SERVICE TELEVISION, INC.

The Association for Maximum Service Television, Inc. ("MSTV") hereby files reply comments in response to the Second Notice of Proposed Rulemaking, ET Docket No. 94-32, released in the above captioned docket on February 17, 1995 (the "Second Notice").

INTRODUCTION

As MSTV and the Joint Commenters emphasized in their initial comments, the proposal to inaugurate a new "General Wireless Communications Services" category for use in allocating spectrum in the 4660-4685 MHz band is technically unsound, will retard innovation in the use of this spectrum, and is unlawful. See Comments of MSTV and the Joint Commenters, ET Docket No. 94-32, at 9-19 (March 21, 1995) ("Joint Comments"). As will be demonstrated below, these views are shared in whole or in part by almost every party to this proceeding. In consequence, the Commission should

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abandon this ill-considered proposal, and instead allocate the 4660-4685 MHz to advanced broadcast auxiliary services.^{1/}

I. The General Wireless Communications Service Classification Is Unsound and Will Impede Innovation in the Use of the 4660-4685 MHz Band.

In the Second Notice, the Commission proposes to create a new General Wireless Communications Service ("GWCS") to license spectrum in the 4660-4685 MHz band. Second Notice, at ¶ 60. However, the vast majority of commenters oppose such an allocation.^{2/} Indeed, only Bell Atlantic, the Wireless Cable Association, and the Small Business Administration endorsed the creation of the GWCS.^{3/} Yet none of these three commenters has provided any data to support the feasibility of such a service.

Moreover, the Commission itself has acknowledged that "a number of legal, technical, economic, and public interest arguments" are outstanding regarding the GWCS.

^{1/} MSTV and the Joint Commenters will be separately filing a Petition for Reconsideration of the First Report and Order/Second Notice of Proposed Rulemaking. The Petition will set forth in greater detail the legal infirmities of the proposed GWCS classification and the use of auctions to allocate spectrum to particular services or uses rather than as a licensing device.

^{2/} See Comments of American Telecasting, Inc., ET Docket No. 94-32, at 4-5 (March 20, 1995); Comments of APCO, ET Docket No. 94-32, at 2-3 (March 20, 1995); Comments of API, ET Docket No. 94-32, at 9-10 (March 20, 1995); Joint Comments, at 9; Comments of UTC, ET Docket No. 94-32, at 5-6 (March 20, 1995).

^{3/} See Comments of Bell Atlantic, ET Docket No. 94-32, at 1 (March 20, 1995); Comments of the SBA, ET Docket No. 94-32, at 2 (March 20, 1995); Comments of the Wireless Cable Association International, Inc., ET Docket No. 94-32, at 3-4 (March 20, 1995).

Second Notice, at ¶ 5. Many parties to this proceeding (including MSTV) have pointed out the unlawfulness of (a) a scheme that has as its paramount objective the ability to auction licenses and (b) using auctions to make allocation decisions. See, e.g., Comments of MSTV and the Joint Commenters, ET Docket No. 94-32, at 9-11 (December 19, 1994). MSTV and others have also argued that the proposed GWCS will be plagued by interference problems caused from the operation of mutually-incompatible services. See Joint Comments, at 9-13. Finally, it is entirely unclear how establishing the GWCS would serve the public interest, given the technical problems it would create and the near-universal opposition to the proposed service from those who wish to use the 4660-4685 MHz band.

Significantly, none of the comments filed in support of the GWCS addresses any of these concerns. See, e.g., Comments of Bell Atlantic, at 2 (citing only the Commission's statements in the Second Notice in support of a GWCS). Even those in the wireless cable community who support the Commission's proposed allocation plan in a general way recognize that the GWCS is neither technically nor legally sound.^{4/} See Comments of American Telecasting, Inc., ET

^{4/} The SBA's characterization of the proposed allocation as "Solomonic" is inappropriate. Comments of the SBA, ET Docket No. 92-32, at 2 (March 20, 1995). King Solomon only threatened to cut the baby in two as a way to save the baby whole. In contrast, the proposed allocation scheme would, if not destroy the utility of the 4660-4685 MHz band by division, (continued...)

Docket No. 94-32, at 4-6 (March 20, 1995) (arguing that spectrum should be allocated to wireless cable exclusively).

This lack of support for a GWCS should not come as a surprise. The Commission's proposal to group a large number of potentially incompatible uses within the same 25 MHz of spectrum raises insurmountable problems for anyone considering the engineering difficulties associated with existing in such an environment. Joint Comments, at 9-12; see also Comments of American Telecasting, Inc., at 5 (seeking spectrum for a "clean, unencumbered return channel"). Given the strong opposition that exists to the creation of this hodge-podge service by the parties with the greatest interest in maintaining operations in the 4660-4685 MHz band, the proposal should be abandoned in favor a service-specific allocation scheme.

As MSTV and others have previously argued, the 4660-4685 MHz band could best be utilized to support advanced broadcast auxiliary operations. See Joint Comments, at 2-9. Broadcasters have made a unique and compelling case for access to the 4660-4685 MHz band, and this spectrum should therefore

^{4/}(...continued)

then substantially impair its use by fragmenting it into competing and incompatible allocations. See Joint Comments, at 9-12.

be allocated to broadcast auxiliary services. See Joint Comments, at 2-9.^{5/}

II. Spectrum Used for Non-Subscriber Based Services Cannot Be Auctioned.

The Second Notice asserts that if allocated to GWCS, the 4660-4685 MHz band would be used primarily for subscriber based services. Second Notice, at ¶¶ 65, 68. MSTV agrees with PCIA's observation that "there is no record in this proceeding to support this conclusion." Comments of PCIA, ET Docket No. 94-32, at 3 (March 20, 1995); see also Comments of UTC, ET Docket No. 94-32, at 6 (March 20, 1995).

Plainly, the GWCS as proposed by the Commission would not, in truth, qualify as a "subscriber-based" service. Only one potential use within the proposed GWCS -- wireless cable -- qualifies as a subscriber service. Television broadcast, land mobile, and microwave applications are not subscriber-based, and to create a category that lumps these operations together with a single subscriber-based service does not meet the requirements of section 309(j).^{6/}

^{5/} APCO supports MSTV's position that the 4660-4685 MHz band could be used successfully for electronic newsgathering operations, and suggests that certain public service agencies, like broadcasters, need access to spectrum for ENG operations incident to their work. See Comments of APCO, at 3-4 ("The 4660-4685 MHz band appears to be particularly appropriate for such video operations.").

^{6/} "The enactment of section 309(j) should not affect the manner in which the Commission issues licenses for virtually all private services, including frequencies utilized by Public Safety Services, the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible (continued...)"

Moreover, there is no evidence in the record to support the conclusion that a majority of the 4660-4685 MHz band's uses will be subscriber-based, and a mere assumption that this will be so does not satisfy section 309(j)'s "reasonable likelihood" standard.^{1/} In these circumstances, it would be unlawful to use auctions to distribute licenses in the 4660-4685 MHz band.

MSTV also agrees with APCO's observation that "using auctions to allocate spectrum (whether explicitly, or implicitly through broad, flexible allocations such as 'Fixed or Mobile') is a violation of the Commission's limited authority to use auctions only to assign frequencies among mutually-exclusive applicants." Comments of APCO, ET Docket No. 94-32, at 2 (March 20, 1995).^{2/} Indeed, the only parties who support the use of the auction methodology are some potential wireless cable providers and Bell Atlantic. See Comments of American Telecasting, Inc., at 2-3; Comments of

^{1/} (...continued)
from the main channel signal." See H. Rep. 111, 103rd Cong., 1st Sess. 253, reprinted in 1993 U.S. Code Cong. & Admin. News 378, 580.

^{2/} Before designating spectrum for auction, section 309(j) requires the Commission to determine that the "principal use" of the spectrum "will involve, or is reasonably likely to involve" subscriber-based services. 47 U.S.C. § 309(j) (2) (A). The evidence contained in the record is not sufficient to satisfy this standard and, in fact, supports the conclusion that the 4660-4685 MHz band -- if allocated to the GWCS -- will not be used primarily for subscriber-based services.

^{3/} See also Comments of API, at 5-6; Comments of UTC, at 6.

Bell Atlantic, at 2-4; Comments of the Wireless Cable Association, Inc., at 2.^{2/}

CONCLUSION

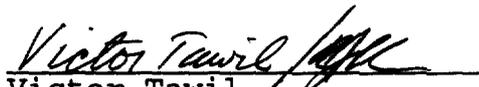
The Commission should reject the concept of a GWCS, because such a service would preclude the efficient use of the 4660-4685 MHz band. Instead, the band should be allocated to wideband advanced digital video services and terrestrial fixed and mobile auxiliary operations; such an allocation would constitute a significant step toward resolving the present overcrowding problem that plagues the existing broadcast auxiliary spectrum, and would help to pave the way for the transition to ATV television broadcasting. Finally, spectrum auctions would be an appropriate means of distributing licenses only if the service designated to use the band is subscriber-based and a particular license is the subject of mutually-exclusive applications. Because neither of these conditions has been met, spectrum auctions cannot lawfully be

^{2/} Once again, the wireless cable industry is not of a single mind. LEACO appears to oppose the use of auctions to distribute licenses in the 4660-4685 MHz band. Comments of LEACO Rural Telephone Co., at 5-6.

used to license services to use spectrum in the 4660-4685 MHz band.

Respectfully submitted,

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